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Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 160.

CHARLES A. TINKER,
Plaintiff in Error,

against

FREDERICK L. COLWELL,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief and Points of Counsel for the Plaintiff in Error.

NELSON SMITH,
Of Counsel for Plaintiff in Error.
141 Broadway,
City of New York.

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This is a writ of error to the Supreme Court of the State of New York to review an order of said Court in the suit of said Frederick. L. Colwell against Charles A. Tinker, entered on the decision of the Court of Appeals, holding and deciding that the discharge in bankruptcy granted to said Tinker, the plaintiff in error, did not release him from the judgment in question recovered in said suit by the said Frederick L. Colwell, the defendant in error.

Statement of Facts.

I.—On the 9th day of February, 1897, said Frederick L. Colwell, as plaintiff, recovered a judgment

against the said Charles A. Tinker, as defendant, in the Supreme Court of the State of New York, for the sum of $50,653.98, damages and costs in an action for *criminal conversation with his wife.*

The judgment roll in said action was filed in the Clerk's office of the Court and of the County of New York on the said 9th day of February, 1897, and said judgment was on that day duly docketed in the said County Clerk's office.

II.—On the 13th day of September, 1899, the said Charles A. Tinker, plaintiff in error, was duly adjudicated bankrupt, on his own petition, by the District Court of the United States for the Southern District of New York (fol. 4).

III.—On the 2d day of February, 1900, the said Charles A. Tinker, plaintiff in error, by the order and judgment of the said District Court, made in said bankruptcy proceeding, was duly discharged from all his debts and claims against him, which were made provable by the Acts of Congress relating to Bankruptcy against his estate, and which existed on the 13th day of September, 1899, the day he was adjudicated bankrupt, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy (see Petition, fols. 4, 5, and the Discharge in Bankruptcy, granted to him by Hon. Addison Brown, Judge of the United States District Court, fol. 7).

IV.—The record shows that on the application of the plaintiff in error for his discharge in the District Court, the jurisdiction of that Court, on the plaintiff's right to discharge, was raised by objections filed by the defendant in error, and exceptions thereto filed by the plaintiff in error.

The exceptions of the plaintiff in error were sustained, and the objections of the defendant in error were overruled, and the right of the plaintiff in

error to his discharge was determined and established in his favor (fols. 8-12).

V.—By the Code of Civ. Pro., Sec. 1268, it is provided that at any time, after one year has elapsed since the bankrupt was discharged from his debts, pursuant to the Act of Congress relating to bankruptcy, he may apply, upon proof of his discharge to the Court in which a judgment was recovered against him, for an order directing the judgment to be cancelled and discharged of record; and that if it appears upon the hearing that he has been discharged, an order *must be made* directing the judgment to be cancelled and discharged of record.

The following is a copy of this Section of the Code of Civil Procedure of the State of New York:

"Section 1268. (Am'd. 1899). Discharge of a judgment against a bankrupt.

"At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the Acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the Court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it, or filing a transcript thereof, for an order, directing the judgment to be cancelled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which such judgment was recovered, an order must be made directing said judgment be cancelled and discharged of record; and thereupon the Clerk of said Court shall cancel and discharge the same by marking on the docket thereof, that the same is cancelled and discharged by order of the court, giving the date of entry of the order of discharge. Where the judgment was a lien on real property owned by the bankrupt prior to the time he was adjudged a bankrupt, the lien thereof upon said real estate shall

not be affected by said order and may be enforced, but in all other respects the judgment shall be of no force or validity, nor shall the same be a lien on real property acquired by him subsequent to his discharge in bankruptcy. Notice of the application, accompanied with copies of the papers upon which it is made, must be served upon the judgment creditor, or his attorney of record in said judgment, in the same manner as prescribed in sections seven hundred and ninety-six and seven hundred and ninety-seven of the Code of Civil Procedure, if the residence or place of business of such creditor, or his attorney is known, but if unknown and cannot be ascertained after due diligence, or if such creditor is a non-resident of this State, and his attorney is dead, removed from, or cannot be found within the State, upon proof of said facts by affidavit a Judge of the Court may make an order that the notice of such application be published in a newspaper designated therein once a week for not more than three weeks, which publication, shown by the affidavit of the publisher, shall be sufficient service upon such judgment creditor, of the application."

VI.—After the expiration of one year from the time of his discharge in bankruptcy, and on or about the 12th day of June, 1901, the plaintiff in error applied to the Supreme Court of the State of New York, at Special Term, on petition and notice, pursuant to the Code of Civil Procedure, Section 1268, for the discharge of record of said judgment, and on such application presented to the Court a certified copy of his discharge under the seal of the District Court of the United States (see Notice of Motion, Petition and Discharge, fols. 1-8).

The petition of the plaintiff in error averred that said judgment was not recovered against him for a wilful and malicious injury to the person or property of another (fol. 5).

VII.—No answer or counter-affidavits were put

in to the petition. Hence the allegations of fact alleged in the petition stand admitted.

VIII.—The Court, at Special Term, by an order dated July 1st, 1901, denied the application of the plaintiff in error to cancel said judgment of record (fols. 14, 15).

IX.—The plaintiff in error then appealed from said order denying his application to the Appellate Division of the Supreme Court of the State of New York, First Department (see Notice of Appeal, fol. 16).

X.—The Appellate Division, by an order dated the 8th day of November, 1901, affirmed the order of the Special Term (see Order of Affirmance, fols. 21-22).

XI.—The plaintiff in error thereupon appealed from the order of the Appellate Division to the Court of Appeals (see Notice of Appeal, fol. 24).

XII.—The Court of Appeals made a decision affirming the order of the Appellate Division holding that the discharge in bankruptcy did not release the plaintiff in error from the judgment in question (see Remittitur, fols. 29-31, and Opinion of the Court of Appeals, fols. 35-38).

XIII.—On the remittitur from the Court of Appeals the Supreme Court entered an order bearing date February 14, 1902, making the judgment of the Court of Appeals the judgment of the Supreme Court, affirming the order of the Appellate Division with costs (fol. 32).

XIV.—And thereupon the plaintiff in error sued out the writ of error from this Court to the

Supreme Court of the State of New York to review the said order and decision (fols. 39-42).

XV.—The plaintiff in error filed assignments of error alleging that in the decree or order of the Supreme Court of the State of New York, as affirmed by the judgment of the Court of Appeals of said State, there is manifest error in this, to wit:

1. That the said Court erred in deciding and adjudging that the discharge in bankruptcy in question granted by the District Court of the United States to the plaintiff in error on the 2d day of February, 1900, did not release and discharge him from the judgment in question recovered against him by the defendant in error on the 9th day of February, 1897, for the sum of $50,000 damages and $653.98 costs, and in denying the application of the plaintiff in error for the cancellation and discharge of record of the said judgment in the office of the Clerk of said Supreme Court for the County of New York, etc.

2. That the said Court erred in deciding and adjudging that the plaintiff in error was not released and discharged by said discharge in bankruptcy from said judgment in question recovered against him by the defendant in error.

3. In deciding that the action in question in which the said judgment was recovered against the plaintiff in error was an action for a wilful and malicious injury to the person of the defendant in error; whereas, by the law of the land, it ought to have decided that the said action in which the said judgment was recovered was not an action for wilful and malicious injury to the person of the defendant in error.

4. In deciding that the action in question, in which the said judgment was recovered against the

plaintiff in error, was an action for a wilful and malicious injury to the property of the defendant in error; whereas, by the law of the land, the said Court ought to have decided that the said action in which the judgment was recovered was not an action for wilful and malicious injury to the property of the defendant in error.

5. In deciding that the said judgment in question recovered against the plaintiff in error came within the exceptions of Section 17a of the Bankrupt Act, and that, therefore, the plaintiff in error was not released by said discharge in bankruptcy from said judgment; whereas, by the law of the land, the said Court ought to have decided that said judgment did not fall or come within the exceptions of said Section 17a of the Bankrupt Act, and that the plaintiff in error was released therefrom by the said discharge in bankruptcy.

6. That by the record aforesaid of said Supreme Court of the State of New York, it appears that the order aforesaid was given for the defendant in error and against the plaintiff in error; whereas, by the law of the land, the said order ought to have been given for the said plaintiff in error against the said defendant in error, and, therefore, was erroneously given (see Assignments of Error, fols. 43-46).

POINTS.

First.—The discharge of the plaintiff in error in bankruptcy released him from the payment of the judgment in question, it not having been recovered in an action for any of the causes mentioned in the exceptions of Section 17a of the Bankrupt Act as the same existed at the time the discharge was granted.

These are words of the section:

"(Sec. 17a). A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * * * * * * * * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses, or false representations, or for wilful and malicious injuries to the person or property of another."

Bradenburg on Bankruptcy, 264.

I.—As the enacting clause of this section is general that a discharge shall release a bankrupt from all his provable debts, save such as are expressly excepted, the exceptions to it must be strictly construed and the burden is on the defendant in error to show that his debt falls within the exceptions.

U. S. *v.* Dickinson, 15 Peters, 141, 165.
Spiers *v.* Parker, 1 T. R., 141.
1 Sedgwick on Construction of Statutes (2d Ed.), 50.
Potter's Dwarris on Statutes, 118–119.

In U. S. *v.* Dickinson, *supra*, Mr. Justice Story, delivering the opinion of the Court (page 165) said:

"We are led to the general rule of law which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

In Spiers *v.* Parker, *supra*, which involved the construction of an exception in a statute.

"The rule is" said Mr. Justice Ashurst, "that any man who will bring an action for a penalty on an act of Parliament, must show himself entitled under the enacting clause; but if there be a subsequent exemption that is a matter of defense, and the other party must show it, to exempt himself from the penalty."

II.—The debts excepted are judgments recovered in actions for fraud or for wilful and malicious injuries to the person or property of another. This means that the gravamen of the action must be for fraud or for malice as the case may be.

Burnham *v.* Pidcock, 58 App. Div., 273-275; s. c. 5 Am. B. R., 590.
Matter of Rhutassel 2 Am. B. R., 697, 96 Fed. 597.
Hargadine-McKittrick Dry Goods Co. *v.* Hudson, 6 Am. B. R., 657, 111 Fed. 361-363.

In Burnham *v.* Pidcock, *supra*, judgment had been recovered in an action of tort for the conversion of property, and it was claimed that it came within the exceptions of the Act, and was covered by the word "fraud," but the Court held the claim untenable, and decided that the gravamen of the action, in which the judgment was recovered, was for conversion and controlled.

We present an extract from the opinion of the Court, by Rumsey, J. (p. 275):

"The judgments which are excepted from the effect of a discharge in bankruptcy are, as it is expressed in the statute, judgments for fraud. That phrase means that the fraud is the gravamen of the action in which judgment is recovered, and that proof of the fraud is essential to the right of recovery. It does not include a judgment in which the right of recovery is based upon an act which is

not essentially fraudulent, although in that action fraud may be incidentally shown."

III.—The construction of the act as to a judgment for conversion is equally applicable to a judgment for "*criminal conversation.*" The gravamen of the action in neither case falls within any exception of the statute.

IV.—The gravamen of the action, in which this judgment was recovered, was not for a wilful and malicious injury to the person or property of the defendant in error; but, on the contrary, was for the violation of his marital rights—the loss of *consortum* with his wife.

2 Greenleaf Ev., Sec. 51, and cases cited.
Weedon *v.* Timbrel, 5 T. R., 357.
Barnes *v.* Allen, 1 Abb. Ct. of App. Dec., 111, 117.
In re Tinker, 99 Fed. Rep., 80.
Bigaouette *v.* Paulet, 134 Mass., 123–125.

All of these cases are directly in point.

In Weedon *v.* Timbrell, *supra*, the leading case upon the subject, the action was by Weedon, the husband, against Timbrell for criminal conversation with his wife. It appeared that the plaintiff and his wife had agreed to live separately, that subsequently to their separation the plaintiff proved several acts of adultery committed by the defendant, but there was no proof of any act of adultery before the separation. The case was tried before Lord Kenyon, Chief Justice, and a jury, and the plaintiff was non-suited on the ground that the gist of the action was for the loss of the comfort and society of the wife, and as there was no evidence of any act of adultery before the plaintiff and

his wife had separated, proof of the act afterwards would not support the action.

Under a rule to show cause why there should not be a new trial—Lord Kenyon, Chief Justice; Ashurst, J.; Buller, J., and Gross, J., all held that the *gist of the action was for the loss of the comfort and society of the plaintiff's wife*, and that as the parties had separated by articles of agreement before the act of adultery, it did not appear that the plaintiff had lost anything by the conduct of the defendant.

Lord Kenyon, Ch. J., said: "This is like the case of an action by a father for the loss of service of his child, in which, however, the parent may feel for the violation of his daughter's chastity, it is clear that no action could be maintained unless some evidence be given that the daughter performed some acts of service for the father."

Ashurst, Justice, said: "The gist of this action is the loss of the comfort and society of the plaintiff's wife; that is always inserted in declarations of this kind as material and substantial allegations and the forms of pleading are evidence of the law; then, taking that as a principal, it follows that if the husband separates himself from his wife he cannot be said to be deprived of that comfort and society which he has before renounced."

The other judges were of the same opinion.

The case has been followed ever since in England and in this country.

q. v. Chambers *v.* Caulfield, 6 East., 244.
Winter *v.* Henn, 4 C. & P., 494.
Bartelott *v* Hawkes, 7 Peak's Cases, 7.
Wilton *v.* Webster, 7 C. & P., 198.
Harvey *v.* Watson, 7 M. & G., 644.

In *re* Tinker, 99 Fed. Rep., 79, Judge Addison Brown, who granted the discharge in bankruptcy, in his opinion, said:

"The gist of the action in which this judgment was recovered is the loss of the comfort, society and assistance of the wife" (referring to many cases).

In Barnes *v.* Allen, *supra* (p. 117), the Court said: "The gist of the action, as all the authorities agree, is the loss, without justifiable cause, of the comfort and society of the wife."

The case of Bigaouette *v.* Paulet, *supra*, was an action by the husband for the seduction of his wife. The opinion of the Court expresses the rule of law, we think, very clearly. We present an extract for the consideration of the Court.

ALLEN, J.:

"The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own, in the person or conduct of his wife, has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word "*consortium*," the right to the conjugal fellowship of the wife, to her company, co-operation and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of the husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences; and in such cases, the injurious consequences must be proved and it must be shown that the husband actually lost the company of the wife. This is illustrated in the statement of injuries to a husband in 3 Bl. Com., 139, 140, where such injuries are said to be principally three; abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." * * * The essential injury to the husband consists in the defilement of the marriage bed—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the *consortium* with his

wife, of comfort in her society in that "respect in which his right is peculiar and exclusive."

V.—Malice is not an ingredient of an action for criminal conversation. There is no precedent for such an allegation in either the pleadings or proofs in such cases.

1 Saund. on Pl. and Ev. (5 Am. Ed.), 874–881.
Abb. Trial Ev. (2 Ed.), 863–867.

Full directions with precedents in such actions will be found in Saunders on Pleading and Evidence. Malice is not the gravamen of such actions and wholly unknown to them.

VI.—The only evidence required to support such an action is proof of the plaintiff's marriage, and the defendant's sexual intercourse with his wife.

Berdan *v.* Turney, 99 Cal., 649.

An action for criminal conversation will lie, though the defendant did not know that the woman with whom he conversed in that way was the plaintiff's wife or was married.

Wales *v.* Minor, 89 Ind., 118–121.

Rest if malice eliminate the record of the judgment is considered

VII. The strict construction of the exceptions of the statute requires that the fraud or malice be actual fraud or actual malice, and not fraud or malice implied by law; so held in the construction of the word *fraud* in the bankrupt law of 1867.

Hennequin *v.* Clews, 111 U. S., 676.
Strang *v.* Bradner, 114 U. S., 555.

The bankrupt law of 1867 respecting the effect of a discharge was in these words:

Sec. 33. "And be it further enacted that no debt contracted by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer or while acting in any fiduciary character shall be discharged under this act."

In Hennequin *v.* Clews, *supra*, Hennequin had deposited securities with Clews to be held by him as collateral security for his acceptances for Hennequin's accommodation. Clews hypothicated the securities and the action was brought by Hennequin for a fraudulent conversion. In the meantime Clews had been discharged in bankruptcy. It was held that Clews was released by the discharge in bankruptcy. That his hypothecation of the securities may have been a breach of contract or a conversion, but was not an actual and intentional fraud within the meaning of Section 33 of the brankrupt law. That the word *fraud* in that law meant actual and not implied fraud.

In Strang *v.* Bradner, *supra*, the Court again reiterated its decision that the word fraud in the bankrupt law meant actual and not implied fraud.

VIII.—The principle applies with equal force to the word *malice* in the present bankrupt law, and we submit that it should receive the same construction.

IX.—This conversation by the plaintiff in error with the wife of the defendant in error was not an injury to his person. Nothing short of an immediate physical touching can be considered a personal injury.

Mitchell *v.* Rochester Ry. Co., 151 N. Y., 107–109.

Victorian Railways Commissioners *v.* Coultas, L. R. 13 App. Cas., 222, 224–226.

Lehman *v.* Bklyn. City R. R. Co., 47 Hun, 355.

In Mitchell *v.* Rochester Ry. Co., *supra*, the plaintiff, a married lady, was injured by the negligence of the defendant, by which she was frightened in the street, and resulting in her immediate miscarriage. It was held that no recovery could be had, as there was no immediate personal injury.

In Victorian Railways Coms. *v.* Coultas, *supra*, the action was brought by James Coultas, the husband, and Mary, his wife, to recover damages sustained by the wife through the negligence of a servant of the defendants, and for expenses incurred by the husband on account of her illness. The negligence placed the wife of the plaintiff in imminent peril of being killed, whereby she received a severe shock, and suffered personal injuries resulting in impairment of health, loss of memory and eyesight.

The privy counsel held that no recovery could be had; that the personal injuries were not *immediate*, and that nothing short of an immediate personal injury would sustain the action.

X.—The criminal conversation complained of was not an injury to the property of the defendant in error.

(**1**). The husband's right of *consortium* is not property or a property right. An action for the loss of it does not survive, and is not assignable.

Cregin, adm. *v.* Bklyn. Crostown R. R. Co., 83 N. Y., 595, 596, 597.

(**2**). The above action was commenced by James Cregin, as husband, to recover for the loss of the services and society of his wife, and he having died before the trial, the action was continued in the name of Thomas Cregin, as his administrator. An appeal

was taken to the Court of Appeals from the order of continuance, and the Court held that an action by a husband against a common carrier of passengers to recover for the loss of the services of his wife and for expenses paid in consequence of injuries to her person resulting from the defendant's negligence, involved a property right, and did not abate by the death of the husband (see Cregin *v.* Brooklyn Crosstown R. R. Co., 75 N. Y., 192).

But on the trial of the case in the name of Thomas Cregin, as Administrator against the Railway Company, the Trial Court charged the jury that the plaintiff was entitled to recover for his intestate's loss of *consortium or society and comfort of his wife*, as well as for the loss of her services and the money expended for medical attendance and upon appeal the judgment was reversed, upon the ground that the administrator was not entitled to recover for his intestate's right of *consortium* or the loss of the society of his wife.

The line is distinctly drawn by the Court between a husband's right of *consortium or the society of his wife* and his right to the services of his wife. As respects his right to the services of his wife, he had a property right; but as respects his right to *consortium or society of his wife*, he has no right of property, and as to that right the action had abated.

Cregin Adm. *v.* Brooklyn Crosstown R. R. Co., 83 N. Y., 595, 596, 597.

Second.—This case is not affected in any way by the amendment of the Bankruptcy Act of February 5th, 1903. The amendatory act provides as follows:

"That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect; that such cases shall be adjudicated

and disposed of conformably to the provisions of the said act of July 1st, 1898."

Collier on Bankruptcy (4th Ed.), page 845.

Supplement 1903, 57th Congress U. S. Compiled Statutes, page 410.

Third.—The order or judgment of the Supreme Court of the State of New York and of the Appellate Division of the Court of Appeals should be reversed and the application of the plaintiff in error to have the judgment recovered against him cancelled and discharged of record in the Clerk's office of the said Supreme Court in the County of New York, should be granted, with costs in this Court and in all the Courts below.

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